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No. 93-691

In The

Supreme Court of the United States

October Term, 1993

ERMA JEAN PHIPPS,

Petitioner,

v.

ROBERTA K. WILSON, INDIVIDUALLY AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF THE DECEASED, NELLIE MAY WILSON

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Indiana

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Indiana Probate Code violates due process because it does not mandate that personal notice be given to every person who conceivably might want to contest the validity of a will admitted to probate even though those persons have no legally protected right to the assets of the estate.

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OPINION BELOW

The opinion of the Court of Appeals of Indiana (Pet. App. A3-A12) is reported at 610 N.E.2d 851. The order of the trial court (*Id.* at A1-A2) is not reported.

JURISDICTION

The judgment of the Court of Appeals of Indiana was entered on March 10, 1993. A petition for transfer was denied by the Supreme Court of Indiana on August 2, 1993. This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

STATUTES

The petition contains (Pet. 1-5) some pertinent Indiana statutes. In addition, Indiana Code Section 29-1-1-3 (definitions) provides in part:

> "Heirs" denotes those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate, unless otherwise defined or limited by the will.

Indiana Code Section 29-1-7-5 provides in part:

> A petition for the probate of a will and for the issuance of letters testamentary or for the appointment of an administrator with the will annexed, or for the appointment of an administrator, shall state:
>
> * * *
>
> (2) The name, age and place of residence of each heir, in the event the decedent left no will; and the name, age and place of residence of each legatee and devisee, in the event the decedent left a will, so far as such are known or can with reasonable diligence be ascertained by the personal representative.

STATEMENT

1. Nellie May Wilson died on December 6, 1990, in Madison County, Indiana. Pet. App. A4. Nellie Wilson had executed her Last Will and Testament on March 16, 1990. *Id.* at A5. In that will, Nellie Wilson left all of her net estate to her niece by marriage, respondent Roberta

Wilson. *Id.* at A4. The will also named Roberta Wilson the executrix of the estate. *Ibid.* Roberta Wilson cared for Nellie Wilson during her life. *See* Ct. App. Br. of Wilson at 5 (citing record). On December 11, 1990, Roberta Wilson petitioned the Madison Circuit Court for probate of Nellie Wilson's will. Pet. App. at A5. On that date, the court granted the petition and admitted the will to probate. *Ibid.*

The Indiana Probate Code provides that a petition for probate must include the name and address "of each legatee and devisee, in the event the decedent left a will." Ind. Code § 29-1-7-5(2). That statute does not require the petition to list relatives who would have been entitled to an intestate distribution of estate assets if the decedent had not left a will. Pursuant to Ind. Code § 29-1-7-7, the clerk of the court must give notice of the administration of an estate by publishing such notice in a local newspaper and by mailing a notice to all persons listed in the petition for probate.[1] Here, the clerk complied with Indiana's probate code by twice publishing a notice in an Anderson, Indiana newspaper and by giving personal notice to Roberta Wilson – the only person named in the will. *See* Ct. App. Br. of Wilson at 6 (citing record).

On December 27, 1991, over a year after the will had been admitted to probate, petitioner Erma Phipps, a niece of Nellie Wilson, filed in the Madison Circuit Court a complaint contesting the validity of the will. Pet. App. A5. Roberta Wilson, acting as executrix of the estate,

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[1] That section of the Indiana Code also provides for personal notice to creditors – a matter not at issue in this case.

moved to dismiss that complaint as untimely under Ind. Code § 29-1-7-17. That section of the Indiana Probate Code provides that an action contesting a will must be brought "within five (5) months after the date of the order admitting the will to probate." On June 15, 1992, the Madison Circuit Court dismissed petitioner's complaint as untimely. Pet. App. A2.

2. In a unanimous opinion, the Court of Appeals of Indiana affirmed. Pet. App. A3-A12. The court stated that the five-month statutory period for bringing an action contesting a will "is jurisdictional" under Indiana law. *Id.* at A7. The court noted, however, that an action contesting a will is not barred by the statutory period if fraud caused the plaintiff not to meet the five-month deadline. *Ibid.* The court then rejected petitioner's contention that, under the facts of this case, Roberta Wilson acted fraudulently so as to cause petitioner not to meet the filing deadline. *Id.* at A8.

The court of appeals next addressed petitioner's claim that the Indiana Probate Code violates the Due Process Clause because it does not require personal notice to the relatives of the deceased if they are not named in the decedent's will. The court noted (Pet. App. A10) that the initial issue under the Due Process Clause is whether the petitioner was deprived of "property." And the court explained that the question of "property" rights is determined by state law. *Ibid.* The court of appeals then examined Indiana law and ruled that petitioner had no protected property right to the assets of Nellie Wilson's estate. Under Indiana law, a relative who might inherit through intestate succession never has a protected right to the assets of the estate if the decedent leaves a will that

does not name that relative as a beneficiary. *Id.* at A12 (citing Indiana cases). The court distinguished cases from other States where, under different facts and statutes, notice was required to certain persons interested in probate proceedings. *Id.* at A11 n.2. On August 2, 1993, the Supreme Court of Indiana declined to review the Court of Appeals' decision.

ARGUMENT

The decision of the Court of Appeals of Indiana is correct and it does not conflict with the holding of any other court. Thus, no further review of this unique case is warranted.

1. The court of appeals correctly held (Pet. App. A10-A12) that petitioner was not deprived of any protected property right in a way that implicates the procedural safeguards of the Due Process Clause. This Court has often noted that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions defined by the existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth*, 408 U.S. 564 (1972). *Accord Lohorn v. Michal*, 913 F.2d 327, 336 (7th Cir. 1991) (property interests are created by state law). Petitioner suggests (Pet. 10) that she has a "property" interest in the assets of her aunt's estate. That contention, however, is wrong as a matter of Indiana law.

The Court of Appeals surveyed Indiana law and held (Pet. App. A10-A12) that petitioner never possessed a right to the assets of her aunt's estate. Under Indiana law,

"[n]o person has an inherent right to inherit property, and the lawmaking authority – the legislature – has the power to designate who shall inherit property." *Earle v. Indiana National Bank of Indianapolis*, 204 N.E.2d 652, 654 (Ind. 1965). Indiana's Probate Code provides that relatives who might otherwise inherit through intestate succession "may be disinherited" by a will. *Thacker v. Butler*, 184 N.E.2d 894, 896 (Ind. App. 1962). Thus, relatives who are disinherited by a will never "have a vested interest" pertaining to the assets of their relative – either during the relative's lifetime or at their death. *Thacker v. Butler*, 184 N.E.2d at 896. *Accord Scott v. Scott*, 150 N.E.2d 740, 742 (Ind. 1958).

Petitioner also suggests (Pet. 10) that she has a "property" interest by virtue of the Indiana statute (Ind. Code § 29-1-7-17) that creates a cause of action to contest the validity of a will. Even if that cause of action is "property," however, petitioner was not deprived of her "property" in a way that implicates the procedural safeguards of the Due Process Clause. Petitioner's own inaction – not the acts of the State – was the sole reason why petitioner lost any statutory right to contest the validity of Nellie Wilson's will. In such a case, the Due Process Clause does not require the State to provide personal notice or other procedural safeguards typically required when the State's actions cause the deprivation of "property."

This Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), is on point. That case involved an Indiana statute providing that unused mineral rights are forfeited if the owner of those rights does not record its property

interest within a certain time period. The owner of forfeited mineral rights argued that the Indiana statute violated due process because it did not provide property owners with individual notice of the statute and with notice of the duty to record unused mineral interests within a certain time period. This Court rejected that claim. The Court wrote: "The Due Process Clause does not require a [party] to notify a potential plaintiff that a statute of limitations is about to run." *Id.* at 536. The Court observed that the Indiana statute was "self-executing" in the sense that a party lost its property right through operation of the statute and the party's own inaction; no further state action was required. *Ibid.* The Court concluded: "[T]he State of Indiana has enacted a rule of law uniformly affecting all citizens that establishes the circumstances in which a property interest will lapse through the inaction of its owner. [There is no support for the proposition] that an individual must be given advance notice before such a rule of law may operate." *Id.* at 537.

The Court in *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), reaffirmed the holding of *Texaco, Inc. v. Short*. The Court noted that "due process does not require that potential plaintiffs be given notice of the impending expiration of a period of limitations." *Id.* at 486. The Court then explained its decision in *Texaco, Inc. v. Short*:

> The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond the enactment of the limitations period. While this enactment

> is obviously state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause.

Id. at 486-87.

The limitations period at issue in *Tulsa Professional Collection Services v. Pope*, however, was not self-executing. Under Oklahoma's probate scheme, creditors were deprived of their property by actions of the probate court. 485 U.S. at 487. The creditors had obtained their property rights outside of the context of probate proceedings – *e.g.*, accounts receivables or other legally enforceable claims. In probate, the creditors lost their property rights (without notice) by a series of actions of the probate court in combination with that State's nonclaim statute. *Ibid.* Accordingly, this Court held in *Pope* that there was substantial "state action" (*ibid.*) at work in the loss of the creditors' claims so that the procedural safeguards of the Due Process Clause were implicated.

In this case, by contrast, the State played no such role in the loss of petitioner's right to bring an action contesting Nellie Wilson's will. Petitioner's right to bring a legal action (the alleged "property") was created when Nellie Wilson's will was admitted to probate. *See* Ind. Code § 29-1-7-17. From that point in time, the State had no involvement in the loss of petitioner's "property." This case is thus exactly like *Texaco, Inc. v. Short* because petitioner lost her "property" right by her own "inaction" (454 U.S. at 537) in combination with the "self-executing" (*id.* at 536) five-month limitations period in Ind. Code § 29-1-7-17. Hence, as in *Texaco, Inc. v. Short*, the Due

Process Clause was not implicated and the State was not required to give personal notice to petitioner of the operation of Ind. Code § 29-1-7-17. *See* 454 U.S. at 537; *accord Tulsa Professional Collection Services v. Pope*, 485 U.S. at 487-87.

To hold otherwise would lead to absurd constitutional results. For example, Indiana has a Tort Claims Act that allows private parties to sue state entities. *See* Ind. Code § 34-4-16.5-1 *et seq.* Under Indiana law, the right to bring a tort action arises when the state actor commits a tort. At that point, the potential plaintiff has 180 days to give notice of his claim, and that limitations period is self-executing. *See* Ind. Code §§ 34-4-16.5-6 and -7. If petitioner's constitutional theory were correct, however, the State would be required to notify potential tort claimants of their right to bring lawsuits and of the 180-day limitations period. That is not the law.[2] *See Texaco, Inc. v. Short*, 454 U.S. at 536 ("Due Process Clause does not

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[2] Indeed, it would be impossible under petitioner's analysis to distinguish – for purposes of due process – *any* case involving application of a statute of limitations. All such cases involve the fact pattern presented here: the State creates a cause of action (such as a tort or civil-rights claim) and the State also limits that cause of action by a self-executing statute of limitations, *see, e.g.*, Ind. Code § 34-1-2-2 (various limitations periods for actions in Indiana). Under petitioner's theory, the State would somehow have to give personal notice in all cases before a court could use the statute of limitations to dismiss an action. Petitioner's analysis would also mean that state courts would be required to give notice of the 90-day period for filing a petition for certiorari with this Court after the state's highest court issues its judgment. Such notice clearly is not required by the Constitution.

require a [party] to notify a potential plaintiff that a statute of limitations is about to run"); *Tulsa Professional Collection Services v. Pope*, 485 U.S. at 486 (same). *Accord Martel v. Stafford*, 603 A.2d 345 (Vt. 1991) (Due Process Clause does not require probate court to give notice of statute of limitations to potential tort plaintiffs).

2. Even if petitioner had been deprived of "property" by the type of state action that implicates the procedural safeguards of the Due Process Clause, the Indiana Probate Code passes constitutional muster. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), this Court noted that a State has broad power to regulate a party's right to bring a legal action. The Court wrote: "The State may erect reasonable procedural requirements for triggering the right to an adjudication [such as] statutes of limitations." *Id.* at 437. The Court explained that "the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural . . . rule." *Ibid.* Thus, the due-process test for procedural restrictions on a cause of action is "reasonableness." The Indiana Probate Code passes that test.

Indiana's probate code provides notice that a will has been admitted to probate. The clerk of the court twice publishes notice of the administration of the estate in a local newspaper. *See* Ind. Code § 29-1-7-7(b). In addition, the clerk gives notice by mail to all parties named in the will and to all known creditors. Ind. Code § 29-1-7-7(c).[3]

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[3] If the decedent left no will, the clerk gives notice of the estate administration to all "heirs" – *i.e.*, those persons entitled to inherit through intestate succession. *See* Ind. Code §§ 29-1-1-3, 29-1-7-5(2), 29-1-7-7(c).

Accordingly, the administration of an estate in Indiana is a public event with personal notice given to the parties most interested in the estate.

To be sure, the Indiana Probate Code does not require personal notice to disinherited relatives if the decedent left a will. But it is reasonable to assume that, "[a]s a class," relatives who are close enough to the decedent to inherit through intestate succession will "be aware of [their relative's] death" within five months. *Tulsa Professional Collection Services v. Pope*, 485 U.S. at 489. Of course, there will be exceptions but the general assumption itself is a reasonable one. Furthermore, in certain cases, Indiana law permits parties to avoid the five-month limitations period in Ind. Code § 29-1-7-17. As the Court of Appeals noted below (Pet. App. A7), "fraudulent conduct" will excuse a parties' failure to file a will-contest action within the five-month period. There may be other justifications for a party's failure to meet the filing deadline, because the Indiana courts have long held that statutory limitations periods may be tolled by events not mentioned in the statute itself. *See Heckman v. Kassing*, 132 N.E. 379 (Ind. App. 1921).

Perhaps more important, the decisions of this Court make it plain that the Due Process Clause does not require personal notice to persons "whose interests are [] conjectural." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 317 (1950). The Court in *Tulsa Professional Collection Services v. Pope* reaffirmed that principle and wrote: "[I]t is reasonable to dispense with actual notice to those with mere 'conjectural' claims." 485 U.S. at 478. The term

"conjectural" accurately describes the interests of disinherited relatives such as petitioner. When a will is admitted to probate, there is no reason to believe that any particular relative will want to contest the validity of that will. Thus, the executor would have to "guess" about the relatives who might want to file a will-contest action. And if a relative does file such an action, the claim itself is "conjectural." This case illustrates that point. To prove her case, petitioner would have to overcome the facts that Nellie Wilson's will complies with the formal requirements of Indiana law and that her will was prepared with the assistance of a disinterested attorney. *See* Pet. 5.

In sum, the Indiana Probate Code's scheme is reasonable: All parties with concrete and immediate interests are given personal notice, and the rest of the community is given notice through publication. Family members who are not mentioned in a will are given at least five months to learn of the death of their relative.[4] There is no basis for this Court to invoke the Constitution to rewrite those reasonable provisions of Indiana law. *See generally United States v. Fox*, 94 U.S. 315 (1877) (States have plenary power to regulate disposition of assets of deceased).

3. The decision of the Court of Appeals does not conflict with the holding of any other reported decision. Petitioner cites (Pet. 10) cases from Oregon and Kansas for the proposition that relatives must be given actual notice of an estate's administration. Those cases, however, were not resolved on constitutional grounds. On the

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[4] Petitioner does not contend that the five-month period in Indiana law is so short as to violate due process.

contrary, Oregon and Kansas have statutes that require such notice to relatives. *See In re Estate of Barnes*, 512 P.2d 387, 391-92 (Kan. 1973); *Lawver v. Beesley*, 740 P.2d 1215, 1219 (Ore. App. 1987).

Petitioner also cites three cases (Pet. 7, 10) that involved parties who attempted to assert rights under prior wills. *See Garner v. Harrison*, 400 S.E.2d 925 (Ga. 1991); *Weidman v. Stahlhut*, 476 N.W.2d 357 (Iowa 1991), *cert. denied*, 112 S. Ct. 1596 (1992); *Palazzi v. Gardner*, 512 N.E.2d 971 (Ohio 1987). Those cases are distinguishable from this one on the ground that the prior wills in those cases created property rights that were later extinguished by actions of the probate court. In any event, the Ohio court in *Palazzi v. Gardner* ruled that the plaintiff's action was time-barred because the plaintiff had actual notice of the decedent's death; thus, the plaintiff could not contend that he was entitled to official notice from the court. *See* 512 N.E.2d at 977. And in *Garner v. Harrison*, the Georgia court ultimately rested its holding regarding notice to beneficiaries under prior wills on statutory grounds. *See* 400 S.E.2d at 927. In neither case did the court hold that the Due Process Clause requires personal notice of probate proceedings to relatives who might have inherited assets if the decedent had not left a will.

In *Weidman v. Stahlhut, supra*, the Iowa court did state in *dicta* that due process requires personal notice to relatives who would inherit through intestate succession. *See* 476 N.W.2d at 361. In that case, however, the Iowa court held that its decision would not apply retroactively. *Id.* at 363. Thus, the court affirmed the dismissal of the plaintiff's will-contest action. *Ibid.* Significantly, the Iowa court's constitutional analysis will have *no* future effect in

that State because the Iowa legislature has amended that State's probate code to provide for actual notice to relatives who would be entitled to inherit through intestate succession if the decedent left no will. *See* Iowa Code §§ 633.3 (definition of "heir"), 633.304. Thus, there is no reason for this Court to consider the correctness of the abstract due-process discussion in that case.

At bottom, therefore, a decision by the Court in this case would affect only one person – petitioner. Petitioner can cite no other case in any other State that would be affected by the Court's review of this case. And even in Indiana there is no reason to believe that petitioner's situation is likely to reoccur often. It is important to recall that a person is not entitled to official notice of the administration of an estate if he has actual notice of the decedent's death. *See Palazzi v. Gardner* 512 N.E.2d at 977; *Weidman v. Stahlhut*, 476 N.W.2d at 361 n.3. Thus, the facts that give rise to this case must be very uncommon – *i.e.*, petitioner claims she is close enough to the decedent to be entitled to the assets of the estate but she was unaware of the decedent's death for over a year.[5] Accordingly, no further review of petitioner's factually narrow claim is warranted.

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[5] We have been informed by a member of the Indiana Probate Code Study Commission that no one has ever asked the Commission to recommend a revision of the Indiana Probate Code so as to require personal notice to family members who are not named in a will. Thus, the issue presented by petitioner has not been an important topic in Indiana.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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